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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSEMARY MENARD-SANFORD, *et al.*,
Petitioners,

v.

A.H. ROBINS COMPANY, INCORPORATED, *et. al.*,
Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF CERTIORARI

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1. At the center of the opposition of respondent A.H. Robins Company, Inc., to the petition are two assertions: there is adequate funding to pay all claimants in full, and the plan is a carefully constructed scheme of which the injunction barring suits against third parties is an essential component. The latter contention can be disposed of easily because it is, in essence, a plea for this Court to overlook an illegal provision in a reorganization plan if it is necessary to obtain approval of the debtor's officers who are the principal beneficiaries of the provision. However, it is Congress, not Robins or the courts, that decides which conditions may be included in reorganization plans, and hence if the injunction is illegal, it cannot stand no matter how vital its proponents believe it to be.

The full funding contention pervades Robins' opposition and takes various forms, including a suggestion that since *certiorari* is sought only on the legality of the injunction, petitioners have conceded that the funding is adequate. Not only is that argument wrong because petitioners have made no such concession, but it also misperceives the reason for our discussion of the inadequacy of the trust fund. The legality of the injunction does not depend on whether there is enough money to pay all claims in full. *See United States v. Huckabee Auto Co.*, 783 F.2d 1546 (11th Cir. 1986) (injunction set aside even though plan provides for full payment over 60 month period and all payments made on time). Rather, the funding issue is only relevant to explain why petitioners care about the injunction: to assure that all claimants are paid in full.

Although Robins insists that all victims will be fully compensated, its argument conveniently overlooks two facts that, like the 13th and 14th strokes of the clock, undermine all that comes before them. If funding were a certainty, why did Robins and American Home Products insist upon a cap on payments for the Dalkon Shield victims, instead of an open-ended provision as in the Manville reorganization, which places no limits on the right

of victims to receive compensation in full, albeit over an extended period of time? *See MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir.), *cert. denied,* 109 S. Ct. 176 (1988). Even more to the point, why did Robins, on behalf of its senior officials and its attorneys, insist on the injunction barring suits against third parties, to the point of making the injunction a condition to the consummation of the plan, unless there were a real likelihood of underfunding? Both questions, we submit, answer themselves and demonstrate that full funding is anything but the certainty that Robins claims it to be. Indeed, if full finding is as likely as Robins suggests, then the injunction is entirely unnecessary.

2. Despite Robins' efforts to avoid the conflict between this case and the rulings in other circuits, it has failed to point to any principled basis for distinguishing the result below from the other authorities cited by petitioners. In no other case, including the recent decision in *American Hardwoods, Inc. v. Deutsche Credit Corp.*, _F.2d __, No. 87-4438, 1989 U.S. App. LEXIS 13822 (9th Cir. Sept. 15, 1989), has a court of appeals allowed an injunction remotely similar to this one to be included in a reorganization plan. Indeed, *American Hardwoods*' transparently unsuccessful efforts to distinguish its refusal to permit an injunction against the non-debtors there from the Fourth Circuit's decision to allow a virtually identical order here, only underscores the unprecedented nature of the decision below and the need for this Court to review it.

Furthermore, the depth of the conflict is now more apparent as a result of the recent decision of the Eleventh Circuit in *Owaski v. Jet Florida Systems Inc.*, 883 F.2d 970 (1989). There the court of appeals adopted as its own the opinion of the district court which, relying on 11 U.S.C. § 524(e), allowed a former employee to sue the employer, which had undergone reorganization, for defamation, even though the employee could not collect against the company, but only from its insurance carrier. More-

over, it did so despite the recognition that the reorganized company might have to bear some of the expenses of litigation, unlike here where the Trust Fund will bear them all. It did so because it concluded that the purpose of section 524 "is to protect the debtor and not to shield third parties such as insurers who may be liable on behalf of the debtor." 883 F.2d at 975. Otherwise, third parties would escape potential liability and obtain a windfall, *id.* at 976, precisely what will happen here if the injunction stands.

3. Nor can the decision below be justified as a channeling injunction, proper under section 105 of the Bankruptcy Code. 11 U.S.C. § 105. Although the district court heavily relied on that theory, the court of appeals refused to adopt it, and quite properly so.

The proper use of section 105 and the concept of channeling injunctions is illustrated by *MacArthur*, *supra*. There, the Second Circuit upheld an order forbidding suits against an insurance company, which had already fully satisfied its obligation to the debtor as part of the reorganization plan, and directing (or channeling) all suits by victims against the bankrupt estate. But here, petitioners will not seek to satisfy any judgment from property belonging to Robins, and therefore the concept of channeling and the use of section 105 is wholly irrelevant. *See also American Hardwoods*, *supra* (discussing the limits of section 105).

4. The suggestion that even a grant of *certiorari* will end the plan is nothing short of rank speculation. While it is true that American Home Products has the right, despite all its efforts to date, to walk away from the merger with Robins if there is no final order by December 31, 1989, there is no evidence that it will do so. Indeed, it had a similar option this past July, but it voluntarily agreed to an extension of the closing date, and there is no basis to think that the situation has changed since then.

5. In the end, the basic plea of Robins and its three supporters

— none of whom filed a brief in the court of appeals — is a request that the Court disregard the law in the name of paying claimants at least a portion of their damages. But the law is not so malleable that it may be disregarded in the name of allegedly good intentions. Either bankruptcy courts have the power to bar suits against non-debtors in reorganizations, or, as every other court of appeals to consider the question has held, they do not. Either way, the issue is of vital importance in this and virtually every other corporate reorganization, and hence this Court should grant review to answer it in this proceeding.

Respectfully submitted,

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